# In the Supreme Court of the United States.

THE STATE OF MINNESOTA
*v.*
ETHAN ALLEN HITCHCOCK, SECRETARY of the Interior, and BINGER HERMANN, Commissioner of the General Land Office. } In equity.

**THE ANSWER OF ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR, AND BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE, DEFENDANTS, TO THE BILL OF COMPLAINT OF THE STATE OF MINNESOTA, COMPLAINANT.**

The defendants admit that the said Ethan Allen Hitchcock is Secretary of the Interior and is a citizen of the State of Missouri, and that the said Binger Hermann is Commissioner of the General Land Office, and is a citizen of the state of Oregon.

The defendants, disregarding the uncertainty in the bill of complaint of the complainant respecting the lands the title to which is intended to be made the subject of judicial inquiry in this suit, answer the said bill upon the belief that the lands the title to which is intended to be made the subject of such judicial inquiry are sections 16 and 36 in each township embraced in the district or

country designated as the "Red Lake Reservation" in the act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14, 1889 (25 Stat., 642), which district or country is more particularly bounded and described as follows, to wit:

Beginning at the point where the international boundary between the United States of America and the British Possessions in its easterly course intersects the westerly shore of the Lake of the Woods; thence in a direct line in a southwesterly direction to the head of Thief River; thence down the main channel of said Thief River to its mouth on the Red Lake River; thence in a southeasterly direction in a direct line toward the head of Wild Rice River to a point where such line intersects the northwestern boundary of a tract of country ceded to the United States of America by a treaty concluded at Washington on the 22d day of February, 1855, with the Mississippi Pillager and Lake Winnibigoshish bands of Chippewa Indians (10 Stat., 1165); thence in a straight line to the northern extremity of Turtle Lake; thence in a straight line to the source of Black River; thence down Black River to its mouth on Rainy Lake River, and thence westerly along the international boundary between the United States of America and the British Possessions to the point of beginning, according to the location and marking of such boundary lines by special surveys of the United States made for that purpose. And the defendants allege that, as nearly as can be approximated, considering that a large portion thereof still remains unsurveyed as hereinafter stated, said dis-

trict or country embraces 3,546,356 acres, or 154 townships, in which there are 308 sections numbered 16 and 36, containing 197,120 acres.

And the defendants also admit that by the eighteenth section of the act of Congress entitled "An act to establish the territorial government of Minnesota," approved March 3, 1849 (9 Stat., 403), it was enacted as follows:

> *And be it further enacted*, That when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same.

The defendants also admit that by the fifth section of the act of Congress entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States," approved February 26, 1857 (11 Stat., 166), it was enacted as follows:

> SEC. 5. *And be it further enacted*, That the following propositions be, and the same are hereby, offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said State of Minnesota, to wit:
>
> *First*. That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part

thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools.

And the defendants also admit that by the joint resolution of Congress entitled "A resolution relative to sections sixteen and thirty-six in the Territories of Minnesota, Kansas, and Nebraska," approved March 3, 1857 (11 Stat., 254), it was enacted as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That where any settlements, by the erection of a dwelling house, or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the Territories of Minnesota, Kansas, and Nebraska, and in the States and Territories hereafter to be erected out of the same) before the said sections shall have been or shall be surveyed; or when such sections have been or may be selected or occupied as town sites, under and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, or reserved for public uses before the survey, then other lands shall be selected by the proper authorities, in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for." And if such settler can bring himself, or herself, within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the town site be enabled to show a compliance

> with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections, so settled and occupied, shall be in them respectively, as if such sections had not been previously reserved for school purposes.

And the defendants allege that the said joint resolution was adopted by Congress and approved by the President before the acceptance by the people of the Territory of Minnesota of any of the propositions submitted by Congress to the people of that Territory by section 5 of said act of Congress of February 26, 1857.

And the defendants also admit that the people of the Territory of Minnesota, on the 13th day of October, 1857, adopted a constitution for the proposed State of Minnesota, in section 3 of article 2 of which it was declared (Statutes of Minnesota, 1894, vol. 1, LXXIV):

> The propositions contained in the act of Congress entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States," are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall nonresident proprietors be taxed higher than residents.

And the defendants allege that in adopting the said constitution the people of the Territory of Minnesota were acting under the authorization given by the said act of Congress of February 26, 1857, as modified and interpreted by said joint resolution of Congress of March 3, 1857, and that the propositions accepted by the people of the Territory of Minnesota in section 3 of article 2 of said constitution were the propositions submitted by Congress in section 5 of the said act of Congress of February 26, 1857, as modified and interpreted by the said joint resolution of Congress of March 3, 1857.

And the defendants also admit that by the act of Congress entitled, "An act for the admission of the State of Minnesota into the Union," approved May 15, 1858 (11 Stat., 285), the State of Minnesota was duly admitted into the Union on an equal footing with the original States in all respects whatever, and that by this last-named act of Congress it was, among other things, recited and enacted as follows:

> Whereas an act of Congress was passed February twenty-six, eighteen hundred and fifty-seven, entitled, An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States;" and whereas the people of said Territory did, on the twenty-ninth day of August, eighteen hundred and fifty-seven, by delegates elected for that purpose, form for themselves a constitution and State government, which is republican in form, and was ratified and adopted by the people at an election held on the

thirteenth day of October, eighteen hundred and fifty-seven, for that purpose: Therefore

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

And the defendants allege that at the time of the passage of the said act of Congress of March 3, 1849, and at the time of the passage of the said act of Congress of February 26, 1857, and at the time of the passage of said joint resolution of Congress of March 3, 1857, and at the time of the adoption of a constitution for the proposed State of Minnesota by the people of the Territory of Minnesota, and at the time of the passage of the said act of Congress of May 11, 1858, admitting the State of Minnesota into the Union, the district or country hereinbefore described was unceded Indian lands, subject to the original right of occupancy of the Chippewa Indians; that all of said district or country remained unsurveyed until after the passage of the act of Congress of January 14, 1889, heretofore and hereinafter named, and until after the cession of March 4, 1890, hereinafter named, excepting that the exterior boundary lines of said district or country had been located and marked by special surveys made by the United States for that purpose; that a very large portion of the lands embraced in said district or country, to wit, approximately 1,093,737 acres, continue to be unsurveyed

at the date of this answer, although the work of surveying the same is now in progress; that by the treaty of October 2, 1863 (13 Stat., 667), and prior to the extension of the public surveys of the United States over any portion of said district or country the same was reserved for the use and occupancy of the Chippewa Indians, and this reservation was recognized and confirmed by the President of the United States in an order made by him March 18, 1879, enlarging what was then known as the White Earth Indian Reservation, and was further recognized and confirmed by Congress in said act of January 14, 1889, and in an act entitled "An act granting to the Duluth and Winnipeg Railroad Company a right of way through certain Indian reservations in Minnesota," approved June 2, 1890 (26 Stat., 126).

And the defendants also admit that no settlement has been made upon any part of any section 16 or 36 in said district or country, by the erection of a dwelling house or the cultivation of any portion thereof, and that no part of either of said sections has been selected or occupied as a town site.

And the defendants allege that under said act of Congress of January 14, 1889, such proceedings were had that, on March 4, 1890, with the approval of the President of the United States, and before the extension of the public surveys of the United States over any portion of said district or country, the Chippewa Indians in Minnesota, in the manner prescribed in said act, ceded and relinquished to the United States, for the purpose and upon the terms stated in said act, and not otherwise, a part of the lands embraced in said district or country,

containing approximately 2,882,401.87 acres, and that at the same time the remaining portion of said district or country, embracing approximately 663,954.22 acres, to wit, commencing at the point on Thief River where the same crosses the line between Marshall and Polk counties; thence easterly to the most northwesterly point of the upper Red Lake; thence easterly along the northerly shore of said upper Red Lake to a point due north of a point 1 mile east from the easterly end of lower Red Lake; thence due south to the last-named point; thence southwesterly in a straight line to a point on Hay Creek 1 mile from where said creek enters the lower Red Lake; thence south to a point from which a line extending west passes midway between what is called the "big marsh" and the sugar bush north of and nearest to said marsh, said sugar bush being on the Red Lake and White Earth road; thence west along said line between said marsh and sugar bush to Clear Water River, said line being supposed to be about 6 miles south of the lower Red Lake; thence northwesterly along said Clear Water River to the point where said river crosses the boundary of Red Lake Reservation, as the same had theretofore existed; thence along said reservation line to the place of beginning, as designated on a map published in 1888 by Rand, McNally & Co., of Chicago, Ill., was reserved for allotment in severalty to individual Indians, as provided in said act; and said defendants deny that said cession entirely extinguished the Indian title to any portion of said district or country, but allege that the conditions and restrictions placed by said act of Congress on January 14, 1889, upon the cession so made to the United States by

the Chippewa Indians in Minnesota on March 4, 1890, were such that the United States thereupon and thereby received and now holds the lands so ceded upon an express trust that the same shall be sold and disposed of for the purpose of establishing a fund which shall be the property of said Indians, and which shall be used and applied exclusively for their relief and civilization.

And said defendants allege that by reason of the matters hereinbefore admitted, shown, and alleged all of said district or country, including sections 16 and 36 therein, was, before the survey thereof, and still continues to be, set apart and appropriated by the United States for the relief and civilization of its wards, the Chippewa Indians in Minnesota, to the exclusion of all other purposes and persons, and that this was and is a reservation of said lands for public uses.

And said defendants deny that any lands embraced in sections numbered 16 or 36 in said district or country were, by the United States, granted to, or inured to, or became vested in the State of Minnesota, and allege that, by reason of the premises aforesaid, all of the lands in sections numbered 16 and 36, in said district or country, were and are excepted from the grant of school lands in place to said State.

And said defendants also admit that in the act of Congress entitled "An act to amend an act entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota,'" approved February 26, 1896 (29 Stat., 17), it was enacted that—

> Sections numbered sixteen and thirty-six in each township so surveyed shall not be sold until the claim

of the State of Minnesota to the ownership of said sections as part of the school lands of said State shall have been determined.

But said defendants allege that the present Secretary of the Interior, one of the defendants herein, on May 9, 1899 (28 Land Decisions, 374), as the head of the Land Department of the United States, after due notice to the State of Minnesota and after a full presentation by said State of its claim to said lands, did deny and reject the claim of said State to sections 16 and 36 in said district or country; and the defendants allege that the said act of Congress of February 26, 1896, relates exclusively to the lands embraced in the cession of March 4, 1890, herein named, and does not affect any of the lands not embraced in that cession.

And the defendants also admit that after the cession of March 4, 1890, herein named, the succeeding Secretaries of the Interior and Commissioners of the General Land Office, including these defendants, have proceeded with the execution and administration of said acts of Congress of January 14, 1889, and February 26, 1896, and that at the time of the commencement of this suit these defendants were intending—and since the said denial and rejection by the Secretary of the Interior of the said claim of the State of Minnesota they have been intending—in the execution and administration of said acts of Congress, to dispose of all of the sections numbered 16 and 36 in said district or country, according to the respective provisions and requirements of said acts, to the entire denial and exclusion of any right of the State of Minnesota to any of said sections.

And the defendants admit that in due time after the passage of said act of Congress of January 14, 1889, the State of Minnesota notified the Secretary of the Interior and the Commissioner of the General Land Office that it claimed title to each and every section numbered 16 and 36 within said district or country, and that said State has ever since continued to assert said claim.

And the defendants deny that on or about September 7, 1891, or at any other time, the Commissioner of the General Land Office acknowledged or held that the title or right to any section numbered 16 or 36 within said district or country was in the State of Minnesota, but allege the facts to be that Cushman K. Davis, then a Senator in Congress from the State of Minnesota, and acting on behalf of that State, in three several letters addressed to the Commissioner of the General Land Office, the first of which bears date September 2, 1891, and the remaining two of which bear date September 3, 1891, notified such Commissioner of the claim of the State of Minnesota to said sections, and that the then Commissioner of the General Land Office, in a letter addressed to Senator Davis, bearing date September 9, 1891, did, without the approval or knowledge of the Secretary of the Interior, and without notice to the Chippewa Indians in Minnesota, or opportunity on their part to be heard, either directly, or through the Commissioner of Indian Affairs or the Secretary of the Interior, the officers charged with the supervision of Indian affairs, and without considering the said joint resolution of March 3, 1857, or the character of the said cession of March 4, 1890,

answer the said communications of Senator Davis by referring to the act of Congress of February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes of the United States (26 Stat., 796), and then declaring:

> Said State is entitled to the sixteenth and thirty-sixth sections in every township within the Indian reservations in said State, upon the extinguishment of the Indian title and the survey of the lands under the direction of the United States Government, and to indemnity for those sections within the unceded portions of said reservations if the State shall elect to select such indemnity lands in preference to waiting for the Indian title to be extinguished in order that it may take those sections in place, in which event the selection of such indemnity lands by the State would be a waiver of the right to claim the said school sections in place.

And by reason of these matters the defendants allege that the action of the Commissioner of the General Land Office, had in September, 1891, to which complainant refers, is of no effect and can not affect the duties of these defendants in the premises or the rights of the Chippewa Indians in Minnesota to the lands in controversy.

As to sections numbered 16 and 36, embraced within the said cession of March 4, 1890, these defendants allege that no part thereof has been allotted to any Indian, or entered, sold, or disposed of as agricultural land, or pine land, or otherwise; that neither of these defendants, nor any of their predecessors, have sold or authorized the sale of any of the pine or other timber

growing thereon; or of any dead or down timber thereon; and that if any pine or other timber growing thereon, or any dead or down timber thereon, has been felled, cut, or removed, the same has been done without the permission or knowledge of either of these defendants or of any of their predecessors in office.

The defendants also admit that a large portion of said sections 16 and 36, but what portion they have not sufficient knowledge, information, or belief to enable them to state, is covered with pine timber in considerable quantity and of considerable value, but of what quantity and of what value they have not sufficient knowledge, information, or belief to enable them to state.

And the defendants also admit that about 2,547 of said Chippewa Indians in Minnesota, but the exact number these defendants can not state, have become citizens of the State of Minnesota, and, where of requisite age, have become electors of said State, but defendants allege that about 5,000 of said Indians have not yet become citizens of said State.

And, without conceding the materiality or relevancy thereof, the defendants do not have sufficient knowledge, information, or belief to enable them to answer whether said Chippewa Indians or their children or any of them are entitled to participate in the benefits of the school fund of such State, or whether the permanent or any other school fund of such State, on the 11th day of July, 1898, or at any other time, was $11,822,145.58, or any other amount, or has since increased in amount, or is invested in any interest-bearing securities, or whether

any amount produced by any such interest is distributed annually or otherwise among the school districts of the State, or among any of them, or whether the amount so distributed in the year 1897 was $772,947.50, or any other sum, or whether the amount so distributed increases every year, or at all, or whether the unsold school lands of said State amount to 1,327,434 acres, or to any other acreage, or whether the average value of sections 16 and 36 within the said cession of March 4, 1890, is more than $50 per acre.

As to sections numbered 16 and 36 in the portion of said district or country not embraced in the cession of March 4, 1890, but retained for allotment in severalty to Indians, these defendants allege that no part thereof has been allotted to any Indian, or entered, sold, or disposed of as agricultural land or pine land, or otherwise; that neither of these defendants, nor any of their predecessors in office, have sold or authorized the sale of any pine or other timber growing thereon, or of any dead or down timber thereon, excepting that, under the act of Congress of February 16, 1889 (25 Stat., 673), nine contracts were approved by the Commissioner of Indian Affairs and the Secretary of the Interior between March 7, 1890, and April 15, 1896, both inclusive, which authorized the cutting, sale, and removal, by various Chippewa Indians in Minnesota of dead and down timber from parts of that portion of said district or country not included in said cession of March 4, 1890, but retained for allotments in severalty to Indians, but that owing to the fact that the lands

covered by such contracts were not surveyed at the time, the descriptions of the lands embraced in such contracts were not given according to the public surveys, and these defendants do not have sufficient knowledge, information, or belief to enable them to answer whether any of said contracts embraced lands in sections numbered 16 or 36, or whether any timber was cut under any of said contracts from any of said sections; and excepting that, under the act of Congress of June 7, 1897 (30 Stat., 62, 90), the Commissioner of Indian Affairs and the Secretary of the Interior, on March 5, 1898, approved a contract with certain Chippewa Indians in Minnesota, authorizing them, during the logging seasons of 1897 and 1898, to sell, cut, haul, and deliver about 1,000,000 feet of pine saw logs, to be cut from dead timber, standing or fallen, on section 36, in township 153 north, of range 33 west, and four other sections in that vicinity not numbered 16 or 36, at a stated compensation of $5 per thousand feet; but these defendants have no knowledge, information, or belief as to how much or what timber was sold, cut, hauled, or delivered from said section 36 under this contract, or as to what was the value thereof, or as to what sum was received therefor by the United States or the Indians.

And the defendants deny that any other matter, cause, or thing in the complainant's bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of these defendants.

And by reason of the matters herein stated these defendants respectfully show unto the court:

1. That the Chippewa Indians in the State of Minnesota have such an interest in the matter here in controversy, and will be so directly and prejudicially affected by the granting of any portion of the relief sought by the complainant, that they are indispensable parties to this suit, in the absence of whom the court can not proceed.

2. That this suit is not within the original jurisdiction of this court for the reason that the subject-matter thereof is a controversy between the State of Minnesota and the Chippewa Indians in Minnesota, many of whom are citizens of that State.

3. That the complainant is not entitled to any relief against these defendants or either of them.

Wherefore these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ETHAN ALLEN HITCHCOCK,
*Secretary of the Interior.*

BINGER HERMANN,
*Commissioner of the General Land Office.*

WILLIS VAN DEVANTER,
*Assistant Attorney-General,*
*Solicitor, and of Counsel for Defendants.*

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Ethan Allen Hitchcock, being first duly sworn, upon his oath deposes and says that he is the Secretary of the Interior, and as such officer is one of the defendants

named in the foregoing answer; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

ETHAN ALLEN HITCHCOCK.

Subscribed and sworn to before me this 21st day of May, 1900.

[NOTARIAL SEAL.] WM. H. DE LACY,
*Notary Public.*

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No. 4 Orig.

Brf. of Atty. Gen. & Van DeVanter for Defendants.

Filed Oct. 28, 1901.

Office Supreme Court U.S.
FILED
OCT 28 1901
JAMES H. McKENNEY,
Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1901.

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| THE STATE OF MINNESOTA<br>*v.*<br>ETHAN ALLEN HITCHCOCK, SECRETARY of the Interior, and Binger Hermann, Commissioner of the General Land Office. | Original No. 4.<br>In Equity. |

**BRIEF AND ARGUMENT FOR DEFENDANTS AND CHIPPEWA INDIANS (SEE ACT OF MARCH 2, 1901, 31 STAT., 950).**

# In the Supreme Court of the United States.

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| THE STATE OF MINNESOTA<br>*v.*<br>ETHAN ALLEN HITCHCOCK, SECRETARY of the Interior, and Binger Hermann, Commissioner of the General Land Office. | Original No. 4.<br>In Equity. |

**BRIEF AND ARGUMENT FOR DEFENDANTS AND CHIPPEWA INDIANS (SEE ACT OF MARCH 2, 1901, 31 STAT., 950).**

## STATEMENT.

The State of Minnesota asserts title to sections 16 and 36 in each township in what was, on January 14, 1889, the Red Lake Indian Reservation, including that portion thereof which since then has been specially reserved for making allotments to Indians, and prays an injunction restraining defendants from allotting or selling these sections in administering the trust in favor of the Chippewa Indians created by the act of January 14, 1889 (25 Stat., 642).

The original reservation as existing at the date of said act embraced the following tract of country in northwestern Minnesota:

> Beginning at the point where the international boundary between the United States of America

and the British possessions in its easterly course intersects the westerly shore of the Lake of the Woods; thence in a direct line in a southwesterly direction to the head of Thief River; thence down the main channel of said Thief River to its mouth on the Red Lake River; thence in a southeasterly direction in a direct line toward the head of Wild Rice River to a point where such line intersects the northwestern boundary of a tract of country ceded to the United States of America by a treaty concluded at Washington on the 22d day of February, 1855, with the Mississippi Pillager and Lake Winnibigoshish bands of Chippewa Indians (10 Stat., 1165); thence in a straight line to the northern extremity of Turtle Lake; thence in a straight line to the source of Black River; thence down Black River to its mouth on Rainy Lake River, and thence westerly along the international boundary between the United States of America and the British possessions to the point of beginning, according to the location and marking of such boundary lines by special surveys of the United States made for that purpose.

That portion of the original reservation which, under the act of January 14, 1889, has been specially reserved for making Indian allotments, embraces the following:

Commencing at the point on Thief River where the same crosses the line between Marshall and Polk counties; thence easterly to the most northwesterly point of the upper Red Lake; thence easterly along the northerly shore of said upper Red Lake to a point due north of a point 1 mile east from the easterly end of lower Red

> Lake; thence due south to the last-named point; thence southwesterly in a straight line to a point on Hay Creek 1 mile from where said creek enters the lower Red Lake; thence south to a point from which a line extending west passes midway between what is called the "big marsh" and the sugar bush north of and nearest to said marsh, said sugar bush being on the Red Lake and White Earth road; thence west along said line between said marsh and sugar bush to Clear Water River, said line being supposed to be about 6 miles south of the lower Red Lake; thence northwesterly along said Clear Water River to the point where said river crosses the boundary of Red Lake Reservation, as the same has heretofore existed; thence along said reservation line to the place of beginning, as designated on a map published in 1888 by Rand, McNally & Co., of Chicago, Ill.

Sections 16 and 36, here in controversy, contain, approximately, 197,120 acres, of which, approximately, 37,120 acres are in the tract specially reserved for allotments.

The State claims these specific sections as part of its school-land grant, and urges that they have not been so "sold or otherwise disposed of" or so "reserved for public uses before the survey" as to exclude them from that grant and to authorize the State to select other lands as indemnity therefor.

THE REAL QUESTION IS, CAN NOT THE LEGISLATION GRANTING PUBLIC LANDS TO THE STATE OF MINNESOTA IN AID OF PUBLIC EDUCATION THROUGH THE COMMON

SCHOOLS, AND THE LEGISLATION DEDICATING LANDS TO THE CIVILIZATION, EDUCATION, AND SUPPORT OF THE CHIPPEWA INDIANS, BE GIVEN FULL OPERATION AND EFFECT WITHOUT DIMINUTION OR IMPAIRMENT OF THE MEANS PROVIDED FOR THE ACCOMPLISHMENT OF EITHER OF THESE OBJECTS OF PUBLIC CONCERN?

As respects the State of Minnesota, the question is merely one as to the location of the lands which it shall receive. The quantity of its school-land grant is not involved. But as respects the Chippewa Indians, the question is vital and affects the integrity and value of the trust created in their favor by the act of January 14, 1889, to the full extent of the lands in controversy. If the State's present contention is not sustained, it will nevertheless receive, under existing law, an equal area of other lands as indemnity; but there is no law under which an equivalent or indemnity can be obtained by the Indians.

The legislation upon which the controversy arises is as follows:

March 3, 1849, section 18 of the act (9 Stat., 403), organizing the Territory of Minnesota, made the following provision respecting school lands:

> That *when the lands in said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market*, the sections numbered sixteen and thirty-six of each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same.

February 26, 1857 (11 Stat., 166), section 5 of the act, authorizing the formation of a State government for Minnesota, submitted the following proposition to the people of the proposed State:

> That the following propositions be, and the same are hereby, offered to said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said State of Minnesota, to wit:
>
> First. That sections numbered sixteen and thirty-six in every township of *public lands* in said State, and where either of said sections or any part thereof has been sold or otherwise been disposed of other lands, equivalent thereto and as contiguous as may be, *shall be* granted to said State for the use of schools.

March 3, 1857 (11 Stat., 254), before the acceptance of the foregoing proposition, Congress adopted a joint resolution providing—

> That where any settlements, by the erection of a dwelling house or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the Territories of Minnesota, Kansas, and Nebraska, and in the States and Territories hereafter to be erected out of the same) *before the said sections shall have been or shall be surveyed*, or when such sections have been or may be selected or occupied as town sites, under

and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, *or reserved for public uses before the survey*, then other lands shall be selected by the proper authorities in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for." And if such settler can bring himself or herself within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the town site be enabled to show a compliance with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections, so settled and occupied, shall be in them respectively, as if such sections had not been previously reserved for school purposes.

October 13, 1857 (General Statutes of Minnesota, 1894, lxxiv), the people of Minnesota adopted a State constitution, by section 3 of article 2 of which they accepted the proposal of Congress, in the following words:

> The propositions contained in the act of Congress entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and State government, preparatory to their admission into the Union on equal footing with the original States," are hereby accepted,

ratified, and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed higher than residents.

May 11, 1858 (11 Stat., 285), Minnesota was admitted into the Union by an act which provided:

Whereas an act of Congress was passed February twenty-sixth, eighteen hundred and fifty-seven, entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States:" and whereas the people of said Territory did, on the twenty-ninth day of August, eighteen hundred and fifty-seven, by delegates elected for that purpose, form for themselves a constitution and State government which is republican in form and was ratified and adopted by the people at an election held on the thirteenth day of October, eighteen hundred and fifty-seven, for that purpose: Therefore,

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the State of Minnesota, shall be one, and is hereby declared to be one,

> of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

At that time and always theretofore the land in controversy, and other lands within the State, were unceded Indian lands, and it is stipulated between the parties hereto (Agreed Statement of Facts, p. 2):

> Third. That except as its status may have been affected or changed by the treaty of October 2, 1863 (13 Stat., 667), by the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian Reservation, by the act of Congress of January 14, 1889 (25 Stat., 642), or by the act of Congress of June 2, 1890 (26 Stat., 126), or by one or more of these, the district or country embracing the lands in controversy continued to be unceded Indian lands subject to the original right of occupancy of the Chippewa Indians up to the time of the action had on March 4, 1890, under the said act of January 14, 1889.

The President's order of March 18, 1879, above referred to, is as follows (Executive Orders Relating to Indian Reserves, 39):

> It is hereby ordered that the following described lands, situated in the State of Minnesota, viz: Beginning at the northwest corner of the White Earth Indian Reservation, being the northwest corner of township 146 north, range 42 west, and running thence north to the northwest corner of township 148 north, range 42 west; thence west to the southwest corner of township

149 north, range 42 west; thence north to the northwest corner of township 149 north, range 42 west; thence east on the line between township 149 north and township 150 north to the intersection of said line with the southwestern boundary of the Red Lake Indian Reservation; thence southeasterly to the most southerly point of the *Red Lake Indian Reservation;* thence in a northeasterly direction and along the line of the *Red Lake Indian Reservation* to a point due north from the northeast corner of the White Earth Indian Reservation; thence south to the northeast corner of White Earth Indian Reservation, and thence west along the northern boundary line of White Earth Indian Reservation to the point of beginning, be, and the same is hereby, withdrawn from sale and settlement and set apart as a reservation for Indian purposes: *Provided, however*, That any tract or tracts of land included within the foregoing described boundaries, the title to which has passed out of the United States Government, or to which valid homestead or preemption rights have attached under the laws of the United States, are hereby excluded from the reservation hereby made.

By various treaties prior to October 2, 1863, the boundaries of the territory claimed by the various Indian tribes in Minnesota had become defined. That in controversy was within the boundaries claimed and occupied by the Red Lake and Pembina bands of Chippewa Indians. By the treaty of October 2, 1863 (13 Stat., 667), these bands ceded all lands within certain defined boundaries to the United States, and Article

VI of the treaty speaks of the remaining tract as "the reservation," and is as follows:

> The President shall appoint a board of visitors, to consist of not less than two nor more than three persons, to be selected from such Christian denominations as he may designate, whose duty it shall be to attend at all annuity payments of the said Chippewa Indians, to inspect their fields and other improvements, and to report annually thereon on or before the first day of November, and also as to the qualifications and moral deportment of *all persons residing upon the reservation under the authority of law;* and they shall receive for their services five dollars a day for the time actually employed, and ten cents per mile for traveling expenses: *Provided*, That no one shall be paid in any one year for more than twenty days' service or for more than three hundred miles' travel.

This remaining tract was thereafter known as the "Red Lake Indian Reservation." The act of June 2, 1890 (26 Stat., 126), by section 1, granted to the Duluth and Winnipeg Railroad Company a right of way for the extension of its railroad through the "Red Lake [and other] Indian Reservations," the grant being accompanied by restrictions which give full recognition to the existence of the reservation and the rights of the Indians therein.

January 14, 1889 (25 Stat., 642), by an act for the relief and civilization of the Chippewa Indians in the State of Minnesota, Congress provided for a commission to negotiate with said Indians for the complete

cession and relinquishment, "*for the purposes and upon the terms*" stated in that act, and subject to the approval of the President,

> of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, *except the White Earth and Red Lake reservations, and to all and so much of these two reservations* as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts.

That act directed that all the Chippewa Indians in Minnesota, "except those on the Red Lake Reservation," were to be removed to and allotted lands in the White Earth Reservation, and those on the Red Lake Reservation were to be allotted lands on so much of that reservation as should be reserved by the commissioners for that purpose. The excess of lands over those required to fill such allotments was to be surveyed, inspected, classified as agricultural or pine lands, the latter appraised by 40-acre tracts and sold at vendue, the agricultural lands disposed of to actual settlers at $1.25 per acre, and the proceeds arising from the disposition of the two classes of lands to be held and applied as directed in section 7, which reads:

> That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of

all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period, and with like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians: *and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit;* and at the expiration of the said fifty years the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash in equal shares: *Provided*, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such

> interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund, the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live stock, teams, farming implements, and seed for such of the Indians, to the extent of their shares, as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder.

The act makes no specific mention of sections 16 and 36, but the entire Red Lake Reservation is throughout the act treated as an entirety and dedicated to the trust therein created.

The lands in said reservation were wholly unsurveyed at the time of the passage of the act of January 14, 1889, and until after the negotiation of the agreement of March 4, 1900, thereunder. (Agreed Statement of Facts, p. 2.)

March 4, 1890, the President approved an agreement negotiated with said Indians by said commissioners under said act, whereby the Indians ceded and relinquished unto the United States, "*for the purposes and upon the terms stated in said act*," a large part of the Red Lake Reservation, and whereby said commissioners reserved the remaining portion of said reservation "for the purpose of making and filling the allotments" to the Indians on the Red Lake Reservation. (A copy of this written agreement appears in the State's brief, at page 136.)

February 28, 1891 (26 Stat., 796), in perpetuation of the policy early established (sec. 18, act of March 3, 1849, 9 Stat., 403; joint resolution, March 3, 1857, 11 Stat., 254; act of February 26, 1859, 11 Stat., 385; sec. 2275, R. S.) of making the status of sections 16 and 36 at the time of survey and identification the criterion by which to determine whether the State should receive them under the school-land grant or receive other lands of equivalent area as indemnity, Congress declared:

> "Where settlements with a view to preemption or homestead have been or shall hereafter be made, *before the survey* of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be

selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. *And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That

> nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein: but nothing in this proviso shall be construed as conferring any right not now existing.

After the negotiation of said agreement of March 4, 1890, the State of Minnesota presented to the Secretary of the Interior its claim to sections 16 and 36, and the claim being opposed by the Indians, Congress, at the suggestion of the State, directed, by act of January 26, 1896 (29 Stat., 17)—

> That sections numbered sixteen and thirty-six in each township so surveyed shall not be sold until the claim of the State of Minnesota to the ownership of said sections as part of the school lands of said State shall have been determined.

Mr. Towne, of Minnesota, in stating the matter to the House of Representatives, said (Congressional Record, Fifty-fourth Congress, first session, vol. 28, part 1, p. 997): "Accordingly, the bill as now drawn adds a proviso that before the sale shall take place of any of the lands in the school sections the rights of the State of Minnesota, if any, to those lands shall be determined."

The State's claim to the specific sections was subsequently considered and denied by the Secretary of the Interior in a decision (28 Land Decisions, 374) which appears in an appendix to this brief, to which the attention of the court is invited.

Upon these facts the State claims the relief demanded upon two grounds:

1. That the Red Lake Reservation was never, in legal contemplation, a reservation, but unceded Indian lands, and sections 16 and 36, upon the State's admission into the Union, became the property of the State, subject only to the Indian right of occupancy.

2. If that tract of country was an Indian reservation, said sections still became the property of the State, subject only to the incumbrance of the reservation, and that Congress could not make any other disposition of them inconsistent with the State's ownership and should not be held to have intended to do so.

Defendants' contentions are:

1. That this tract of country was a reservation, set apart and appropriated to the uses of the civilization and support of the Indians.

2. That these lands never became "public lands," and so never became subject to the State's school-land grant.

3. That the school-land grant attached to no particular lands until surveyed. Until then the specific sections remained subject to disposition by Congress, the State, in the event of such disposition, being remitted to the selection of other lands as indemnity. Especially did the joint resolution of March 3, 1857, subject these sections in Minnesota to reservation for public uses at any time before survey, and, in the event of any such reservation, make the State's grant, to that extent, one of indemnity lands.

4. That the act of January 14, 1889, and the agreement negotiated thereunder with the Indians, dedicated and appropriated all the lands in the Red Lake Reservation exclusively to the civilization, education, and support of the Indians. This was a disposal of the lands within the meaning of the enabling act of February 26, 1857, and in any event was a reservation of them for public uses under the joint resolution of March 3, 1857.

5. That in interpreting the act of 1889 it is of no moment that the State has a system of common schools aided by a grant of lands from the General Government. That act in terms keeps the education of these Indians under national control, and dedicates a portion of the proceeds of the sale of these lands "exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit."

6. That in determining whether the act of 1889 and the agreement negotiated thereunder were intended to appropriate sections 16 and 36, along with the other lands, to the civilization, education, and support of the Indians, inquiry must be made as to how the act and agreement were understood by the Indians.

## POINTS AND ARGUMENT.

### I.

**The tract of country embracing the sections in controversy was a reservation set apart and appropriated to the uses of the civilization and support of the Indians.**

No statute defines in what manner, or that by any particular form of proceeding, land shall be dedicated

to the uses of an Indian reservation. The creation of a reservation must therefore be a question of fact rather than of form.

This case as to the erection and delimitation of the reservation is strikingly analogous to that of *Spaulding* v. *Chandler* (160 U. S., 394). At pages 403–404 the court said:

> It is not necessary to determine how the reservation of the particular tract, subsequently known as the "Indian Reserve," came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. * * * But whether the Indians simply continued to encamp where they had been accustomed to prior to making the treaty of 1820, whether a selection of the tract, afterwards known as the Indian Reserve, was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. * * * If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the

> direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

In a similar case, *Wilcox* v. *Jackson* (13 Pet., 498), a question arose whether there had been a reservation of certain lands. The court treated it as a question of fact, not of form, and said (p. 512):

> That the land in question has been appropriated in point of fact there can be no doubt, for the case agreed states that it has been used from the year 1804 until and after the institution of this suit, as well for the purpose of a military post as for that of an Indian agency, with some occasional interruption. Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use.

There being power to make an appropriation, a use for that purpose is an appropriation in fact. There being power, conjoined with a use for which such power may be exercised, presumption of the appropriation must arise, as in case of grants. In *United States* v. *Chaves* (159 U. S., 452, 464) the court held—

> that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and such rule will be applied as a *presumptio juris et de jure* wherever, by possibility, a right may be acquired in any manner known to the law.

The power to create this Indian reservation is not questionable. That the power was here exercised is clear. By various treaties between the United States

and these Indians portions of their possessions had, from time to time, been ceded to the United States until the remaining country claimed and occupied by them had acquired fixed boundaries, and had been reduced to an area not exceeding that of many other reservations occupied by like Indian tribes. The treaty of October 2, 1863, by which the last of these cessions was made, in its sixth article denominated the lands retained by the Indians as "the reservation." A reading of the treaty, which is brief (13 Stat., 667), makes it manifest that the reservation referred to is the country retained and to be occupied by the Red Lake and Pembina bands of Chippewa Indians, one party to the treaty, and makes it equally manifest that the words "the reservation" did not have reference to the two separate 640-acre tracts of Moose Dung and Red Bear in the ceded country. But for the suggestion to the contrary, on page 14 of the State's brief, this matter would hardly justify discussion. It is altogether unreasonable to believe that these two individual allotments of Moose Dung and Red Bear were deemed of sufficient importance to require the annual visitation of three missionaries, to be appointed by the President, charged with the duty of annually inspecting the reservation and reporting upon the fields and improvements of the Indians and "the qualifications and moral deportment of all persons residing upon the reservation under the authority of law." The persons about whom the Indians and the Government were thus concerned were the Indian agent, agency employes, Indian trader, and

persons of like station, who would be authorized to take up a residence upon the reserved land. It was of consequence that those persons who would exert some control and much influence over the Indians should possess proper qualifications and deport themselves according to right moral standards. Strong evidence that the retained lands constitute "the reservation" is found in the fact that the missionary or visiting board in the discharge of its duties under Article VI actually visited the Red Lake reservation and inspected and reported upon the conditions there existing, and that Congress annually appropriated the requisite money to compensate the board for so doing. (See reports of the visiting board for the years 1872 and 1873, which appear in the latter part of the appendix to this brief, and see items in appropriation acts appearing in 13 Stat., 178 and 556; 14 Stat., 272 and 497; 15 Stat., 204; 16 Stat., 20, 340, and 550; 17 Stat., 170 and 444.)

This treaty was a contract, and the manner in which it was subsequently executed and given effect by the parties is entitled to great influence in its interpretation, and in this instance makes the intention entirely clear. (1) Shortly after the treaty the Government established and thereafter maintained an Indian agency upon these retained lands, as is shown in the reports of the missionary or visiting board which appear in the appendix hereto. (2) The President's order of March 18, 1879, *supra*, defining the boundaries of the White Earth Reservation, gave Executive recognition to the Red Lake Reservation. (3) The act of

Congress of January 14, 1889, gave repeated legislative recognition to the reservation, and was for the avowed purpose of applying it in another manner to the civilization, support, and education of the Indians. (4) The commissioners appointed under that act, and the Indians themselves, gave direct recognition to the reservation in the agreement negotiated under said act. (A copy of the agreement appears in the State's brief, at page 136.) (5) The act of June 2, 1890, *supra*, also recognized the reservation and made the right of way thereby provided for dependent upon the consent of the Indians.

In the presence of such repeated recognition of the reservation by the executive and legislative branches of the Government and by the Indians, its existence can not be questioned by others.

That the act of January 14, 1889, and the agreement negotiated thereunder absolutely dedicated these lands to the civilization, education, and support of the Indians, and thereby, so far as it affects the present controversy, expressly continued the reservation instead of extinguishing it, will be shown later on.

## II.

**The lands in controversy never became public lands, and so never became subject to the State's school-land grant.**

It can not be claimed, and apparently is not, that the act of 1849 was a grant. It was nothing more than a reservation for the time being of the land therein designated, which could be withdrawn or modified at will by the authority which made it.

The school grant made under the act of 1857 was of "sections numbered 16 and 36 in every township of *public lands* in said State." It was held in *Newhall* v. *Sanger* (92 U. S., 761, 763) that—

> The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from preemption, private entry, and sale apply.

In *Leavenworth, etc., Railroad* v. *United States* (92 U. S., 733, 741) the court, speaking of a grant to the State of Kansas in aid of the construction of a railway, as affecting lands within an Indian reservation, said:

> But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers, within certain defined limits, is granted; but only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy. (*Rice* v. *Railroad Co., supra.*) Since the land system was inaugurated it has been the settled policy of the Government to sell the public lands at a small cost to individuals, and for the last twenty-five years to grant them to States in large tracts to aid in works of internal improvement. But these grants have always been recognized as

> attaching only to so much of the public domain as was subject to sale or other disposal, although the roads of many subsidized companies pass through Indian reservations.

In *Missouri, Kansas and Texas Railway Co.* v. *Roberts* (152 U. S., 114), speaking of the reservation of sections 16 and 36 to Kansas as school lands, the court said (at page 119):

> If the reservation named was intended as a grant of the sections sixteen (16) and thirty-six (36) to the Territory and to the States to be created out of them, or as a dedication of them for schools, it could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands involved in this controversy, as we have already shown.

The same meaning to the words "public lands" is given by the court in the following decisions: *Barker* v. *Harvey* (181 U. S., 481, 490); *Mann* v. *Tacoma Water Co.* (153 U. S., 273, 284); *Doolan* v. *Carr* (125 U. S., 618, 632); *Bardon* v. *Northern Pacific Railway Co.* (145 U. S., 535, 538); *Leavenworth, etc., Railroad Co.* v. *United States* (92 U. S., 733, 745).

The State, at pages 60 to 62 of its brief, seeks to distinguish the case of *Missouri, Kansas and Texas Railway Co.* v. *Roberts, supra*, but it is submitted that the distinction is not well taken.

The words of the grant, limiting it to public lands, referred to lands subject to ordinary appropriation under the general land laws, and this independently of the joint resolution of 1857.

At the time of the act of January 14, 1889, the lands in controversy constituted part of a subsisting Indian reservation. That act and the agreement negotiated thereunder, both being before the survey, withheld the lands from appropriation under the general land laws and dedicated them exclusively to the civilization, education, and support of the Indians. The lands have thus been reserved for public uses since before their survey, and hence never became public lands.

III.

**The school-land grant attached to no particular lands until surveyed. Until then the specific sections remained subject to disposition by Congress, the State, in the event of such disposition, being remitted to the selection of other lands as indemnity. Especially did the joint resolution of March 3, 1857, subject these sections in Minnesota to reservation for public uses at any time before survey, and, in the event of any such reservation, make the State's grant to that extent one of indemnity lands.**

The general purpose of the school-land grant is to aid the object of public education, but its accomplishment does not depend upon the application of the specific sections 16 and 36. It can be accomplished through the application of other lands of equivalent area where the specific sections are not available. In recognition of this, the words of the grant limit it to public lands not sold or otherwise disposed of, and that the grant

may not be materially impaired by sales or other dispositions in advance of the survey and identification of the specific sections provision is made for indemnity where such sections are sold or otherwise disposed of. Until the survey and identification of the specific sections the right of the State is inchoate merely, and full power of disposition remains in Congress.

This proposition is sustained by a decision of this court, interpreting the school-land grant to Nevada (*Heydenfeldt* v. *Dancy Gold and Silver Mining Co.*, 93 U. S., 634). The act of March 21, 1864 (13 Stat., 32), providing for the admission of that State into the Union, provided:

> That sections sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools.

Differing from the proposal to Minnesota, the one to Nevada contains the words "and are hereby," which so strongly denote a present grant. Another difference was that no lands in Nevada had been disposed of at the time of the State's admission. The court rested its decision largely upon general principles, which are of controlling influence here in view of the joint resolution of 1857. The court said (p. 639):

> In this instance words of qualification restrict the operation of those of present grant. Literally construed, they refer to past transactions,

but evidently they were not employed in this sense, for no lands in Nevada had been disposed of by any act of Congress. * * * It could not, as we have seen, apply to past sales or dispositions, and to have any effect at all must be held to apply to the future.

This interpretation, though seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which in its effects would be unjust to the people of the Territory. Besides, no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the State *in præsenti* a quantity of lands equal in amount to the sixteenth and thirty-sixth sections in each township. Until the status of the lands was fixed by a survey and they are capable of identification, Congress reserved absolute power over them, and if, in exercising it, the whole or any part of the sixteenth and thirty-sixth sections had been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests.

The later case of *Beecher* v. *Wetherby* (95 U. S., 517) is relied upon by the State. But the decision in that case does not even mention, much less expressly overrule, the Heydenfeldt case, and arose upon essentially

different facts. The land there in question is in Wisconsin, and was identified by survey in May or June, 1854; the treaty which embraced it in an Indian reservation did not take effect until in August, 1854, and the act of Congress under which it was attempted to sell the land for the benefit of the Indians was not enacted until in 1871, all of which appears in the opinion of the court. The land therefore had been identified by survey and the title had fully vested in the State before its attempted reservation by the treaty and before the attempted authorization for its sale. And even if this difference in facts did not exist between that case and the one at bar, the joint resolution of 1857 expressly ingrafting upon the Minnesota school-land grant a provision whereby the United States retained the right and power to reserve for public uses the specified sections at any time before survey and to remit the State to a selection of indemnity land, makes the decision in *Beecher* v. *Wetherby* impossible of application here.

In *State of Colorado* (5 L. D., 412) Secretary of the Interior Lamar said:

> It is evident from the very terms of the grant that Congress intended to grant to Colorado (and the same is true of other States) two sections for every township in the State, to be taken of the sixteenth and thirty-sixth sections where such sections at the time of survey have not been sold or otherwise disposed of, and where at the time of survey such sections have been sold or disposed of, then other lands equivalent thereto and as contiguous as may be are granted

> to said State in lieu of the sixteenth and thirty-sixth sections.

The rule thus announced has been uniformly followed by the Department. (State of Colorado, 12 L. D., 70.)

The joint resolution of March 3, 1857, *supra*, provided, among other things—

> That where * * * the sixteenth or thirty-sixth sections * * * in the *Territories of Minnesota*, Kansas, and Nebraska, *and in the States and Territories hereafter to be erected out of the same*, * * * *have been or may be* * * * *reserved for public uses before the survey*, then other lands shall be selected by the proper authorities in lieu thereof.

This joint resolution was adopted after the passage of the Minnesota enabling act, but before the propositions contained in that act had been accepted by Minnesota and before the admission of that State into the Union. The resolution also made provision whereby preemption and town-site claimants settling upon these sections in advance of the survey could perfect title to the lands settled upon, and gave the State the right to take other lands of equivalent area as indemnity. Whether this resolution was intended to simply give better expression to the intention of Congress, less strongly stated in the act creating the Territory of Minnesota and in the enabling act of February 26, 1857, that the status of sections 16 and 36 at the time of their survey should be the criterion by which to determine whether they would pass to the State under the school-land grant, or whether the resolution was intended to mod-

ify these prior acts by correcting what was deemed a material omission therein, the result was that thereafter the school-land grant to Minnesota contained an unqualified declaration that sections 16 and 36, where settled upon under the preemption or town-site laws or reserved for public uses before the survey, should not pass to the State, but instead should constitute the basis for the selection of indemnity.

The authority of Congress at that time to place this condition or exception in the school-land grant to the State is obvious; and if it were not, the matter was finally settled by the decision of this court in the case of *Minnesota* v. *Bachelder* (1 Wall., 109), which involved the right of the State to lands in a sixteenth section which were claimed under the preemption law in pursuance of settlement made subsequent to the enabling act and prior to the survey. In presenting the case on behalf of the State, the attorney-general contended:

> The joint resolution of Congress is void. It can not divest a title which the United States had previously granted. The organic act of the Territory constituted a *dedication* to public uses, perpetual and irrevocable, and whatever might have been its effect upon the naked fee, at least divested Congress of all power of disposition over the subject-matter so far as such disposition should tend to impair the public rights created by that act.
>
> * * * * *
>
> Neither is the case helped by the memorial from the Territorial legislature. The organic act (par. 18) indicates an intention to consecrate

> these lands for the benefit of the generations who should in future inhabit the State; and while divesting Congress of all power of disposition over them, to withhold it from any other body then in existence. They are reserved "for the purpose of being applied to schools in said Territory, *and in the States and Territories hereafter to be erected out of the same.*" They were not granted to the Territory, and were in no sense its property.

Justice Nelson, in delivering the opinion of the court, disposed of this matter by saying:

> It is not important to inquire as to the power of Congress to pass this law independently of any application from the Territorial legislature, as the assent of the people through their convention, by coming into the Union as a State, upon the terms proposed, must be regarded as binding the State. The right of the State to the school sections within it must, therefore, be subject to the modification contained in the joint resolution, and that modification is, that in case a person shall have made a settlement upon any school section, by the erection of a dwelling house on the same, or the cultivation of any portion of it before the survey, and, further, can bring himself within the provisions of the preemption act of 1841, he shall be entitled to the section thus improved, in preference to any title of the State.

It is true that the Territorial legislature of Minnesota had, in a memorial to Congress, suggested legislation for the protection of preemption and town-site settle-

ments made upon sections 16 and 36 before the survey, and that the suggestion did not extend to the protection of reservations for public uses, but the authority of Congress was not dependent upon such a suggestion, and the fact that the joint resolution goes further than the suggestion of the Territorial legislature is evidence that the provision protecting reservations made before the survey was deliberately inserted in the Congressional joint resolution for the purpose of giving it a broader effect than it otherwise would have had.

This joint resolution has never been expressly repealed and there is no necessary conflict between it and any subsequent statute. On the contrary, it is in harmony with the general provision contained in the act of February 28, 1891 (26 Stat., 796), that—

> And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections.

It is suggested in the opposing brief that the proviso in the provision just quoted recognizes the State's right

to sections 16 and 36, even where they are included within an Indian, military, or other reservation. The suggestion is not well grounded. It was not to instances like the one now under consideration that the proviso was intended to have application. Military, Indian, and other reservations are established as necessity therefor arises, sometimes before and sometimes after the survey of the lands included therein. Depending upon the permanency of the reservation, and perhaps upon the existence of some applicable provision like that in the joint resolution of March 3, 1857, the reservation, if established before the survey, postpones or cuts off altogether the right of the State to sections 16 and 36. If established after the survey the reservation frequently includes within its exterior limits sections 16 and 36, which by reason of their identification upon survey, have passed to the State beyond any power of revocation by Congress. It is to instances like these that the proviso has reference. (State of California, 28 Land Dec., 57.)

It is true, as urged by the State, that this same act of February 28, 1891, contains a still further proviso—

> That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; *but nothing in this proviso shall be construed as conferring any right not now existing.*

But this is not applicable to reservations which are in their nature permanent and absolute or to reservations the extinguishment of which is coupled with an appropriation and dedication of the lands to other public uses which preclude their restoration to the public domain. The last clause also recognizes that there are instances, like the case at bar, where the State will not be entitled to the specific sections in place even upon the extinguishment of the reservation and the restoration of the lands to the public domain, and therefore declares that "nothing in this proviso shall be construed as conferring any right not now existing."

## IV.

**The act of January 14, 1889, and the agreement negotiated thereunder with the Indians, dedicated and appropriated all the lands in the Red Lake Reservation exclusively to the civilization, education, and support of the Indians. This was a disposal of the lands within the meaning of the enabling act of February 26, 1857, and in any event was a reservation of them for public uses under the joint resolution of March 3, 1857.**

The words of this joint resolution, viz, "have been or may be * * * reserved for public uses," evidently contemplated objects of public concern and included prospective as well as present use and necessity. We have already urged that this, in legal effect, was covered by the terms of the enabling act of February 26, 1857, and the argument will not be now repeated. The public uses for which the lands might be so reserved are not specified in the joint resolution. Congress chose to place no restrictions upon the power

thus reserved, preferring to leave the propriety of each reservation for determination as occasion arose.

The moral obligation of the Government to civilize, educate, care for, and protect the Indians, displaced from their ancient possessions by the irruption of a stronger and more advanced race, has been so often recognized by this court and is so familiar a subject for its consideration as to require here no citation or discussion. That it is a national obligation is firmly established in the legislation of Congress and in the adjudication of the courts. Its fulfillment is a matter of public concern, and moneys or lands dedicated to that object are disposed of and reserved for public uses. The manner in which this moral obligation is to be discharged is solely a matter for the political branch of the Government to determine, and whatever is done in the exercise of political power, acting within its proper sphere, is conclusive upon the courts and beyond their power to review.

At the time of the admission of Minnesota into the Union the lands in controversy were held by dependent domestic Indian tribes. No power existed in the State to remove them from their lands or to terminate their right of occupancy. That could be done only by the General Government in the exercise of its political power, and in the very nature of things the extent to which this should be done, and the terms and conditions thereof, were within the sole cognizance of the political branch of the Government. It was free to exercise this power to such extent, in such mode, and

with such conditions as seemed to it expedient, so long only as the vested rights of others were not interfered with. No vested rights of the State of Minnesota are here interfered with. Until the survey and identification of the specific sections the Government was at liberty to apply them to public uses. This is what is being done; nothing more.

The political branch of the Government defined its policy in this instance by the act of January 14, 1889, and the agreement negotiated thereunder with the approval of the President.

The terms and pledges held out by that act were the basis, consideration, and pledges upon which the Minnesota Chippewas agreed to relinquish their right of occupancy. Under that act and the agreement negotiated thereunder in the nature of a treaty these lands never became public lands of the United States, but were disposed of and appropriated as a trust for the benefit of the Indians. The reservation was, in fact, not extinguished, but the right of occupancy of the lands, not specially reserved for allotment, was converted by the pledges and conditions named in said act and agreement into a right to have the lands disposed of in the manner specially provided and to have the proceeds applied to the civilization, education, and support of the Indians. Neither the act nor the agreement contemplated the restoration of any of the lands to the public domain. An unqualified or absolute cession was not asked by Congress or made by the Indians. The reservation, converted and changed in

form only, still continues. The right to do so, up to the time of survey, Congress, in effect, reserved by its original proposal to Minnesota, and also, in terms, by the joint resolution.

It is only *quo modo*, and for the purposes of the trust, that the right of occupancy has been relinquished. Otherwise than for that purpose and to make the lands by sale more beneficial to themselves, the Indians have never ceded or relinquished them. In the very act of cession, and before their survey, the land was appropriated and disposed of as a trust for the benefit of the Indians, and there remains to the State, under the terms of the proposal and of the joint resolution, only a right to indemnity.

V.

**In interpreting the act of 1889 it is of no moment that the State has a system of common schools aided by a grant of lands from the General Government. That act in terms keeps the education of these Indians under national control and dedicates a portion of the proceeds of the sale of these lands "exclusively to the establishment and maintenance of a system of free schools among said Indians in their midst and for their benefit."**

It is suggested in the opposing brief (p. 68) that if the State obtains these lands they will benefit the Indians in common with all citizens of Minnesota, Indians being entitled to the privileges of the common schools. This is not a sufficient reason for depriving the Indians of the exclusive benefit of the land set apart by the trust.

The obligation to protect the Indians from local hostility, and to provide for their maintenance, instruction,

and civilization, has always been recognized as a national obligation, which could not with justice to the Indians be intrusted to local governments. In *United States* v. *Kagama* (118 U. S., 375), the court reviews and approves former decisions in *Worcester* v. *Georgia* (*supra*), *Fellows* v. *Blacksmith* (19 How., 366), *Kansas Indians* (*supra*), *New York Indians* (5 Wall., 761), and at page 384 says:

> Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. * * *
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it never has been denied, and because it alone can enforce its laws on all the tribes.

The court approves this language in *Choctaw Nation* v. *United States*, *supra*, and in *United States* v. *Choctaw, etc., Nations*, *supra*.

How the care and duty shall be exercised is a political question, and it is not the province of the court to intrude "upon the domain committed by the Constitution to the political departments of the Government," or "in effect determine questions of mere governmental policy." (*United States* v. *Choctaw, etc., Nations, supra.*)

That the State had provided a system of common schools of which the Indians could have the benefit does not determine this controversy. Section 7 of the act of 1899 declares in respect of the trust fund that—

> one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians in their midst and for their benefit.

Congress evidently was not willing, even if the Indians became citizens, to leave the matter of their education to the State authorities, but the better to assure their object, reserved the subject under national control and supervision. Its action in that regard is conclusive.

## VI.

**In determining whether the act of 1889 and the agreement negotiated thereunder were intended to appropriate sections 16 and 36, along with the other lands, to the civilization, education, and support of the Indians, inquiry must be made as to how the act and agreement were understood by the Indians.**

This act and agreement constitute a contract with the Indians, and the rule for its interpretation is now well settled.

It was held in *Worcester* v. *The State of Georgia* (6 Pet., 515, 582):

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

This has ever since been recognized as a proper guide in the interpretation of treaty and contract instruments between the Government and its dependent, unlettered, aboriginal people. It was approved in the *Kansas Indians* (5 Wall., 737, 760), and in *Choctaw Nation* v. *United States* (119 U. S., 1, 27). In that case, page 28, the court further said:

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason

> demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws.

The language of the court in the foregoing decisions is approved in *Jones* v. *Mehan*, (175 U. S., 1, 11) and *United States* v. *Choctaw, etc., Nations* (179 U. S., 494, 532). In the latter case the court, however, observes that:

> In no case has it been adjudged that the courts could by mere interpretation, or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government * * * (p. 538). While the dependent character of the Indians makes it the duty of the court to closely scrutinize the provisions of the treaty and to interpret them "in the light of the larger reason and the superior justice that constitute the spirit

> of the law of nations," *Choctaw Nation* v. *United States* (119 U. S., 1, 28), the court must take care, when using its power, to ascertain the intention of the parties, not to disregard the obvious import of the words employed, and thereby, in effect, determine questions of mere governmental policy.

The rule so announced applies with great force to the present case. If "the obvious palpable meaning of the words of an Indian treaty" may not be disregarded in the interest of the Indian, obviously they can not be disregarded to his prejudice.

Sections 16 and 36 were as much a part of the Red Lake Indian Reservation as were any of the other sections therein. The Indians could not have understood otherwise. The act of 1889 and the agreement negotiated thereunder deal with the reservation as an entirety. Whatever was to be ceded by the Indians was to be applied to their civilization, education, and support through the medium of the sales and the system of accounting therein provided. The provision respecting the application of the lands to these public uses is as broad as the provision respecting the cession. Nothing was said of the sixteenth or thirty-sixth sections, and it is clear that it was not contemplated that these sections should be left out of either the cession or the trust created for the Indians. The lands ceded were to be sold for their benefit. None were to be ceded except as a means to their ultimate sale "*for the purposes and upon the terms*" stated in the act.

This is not an instance where these sections had

become vested in the State to that extent that they were beyond the control of Congress, so that of necessity the legislation must be held to apply only to those lands outside of these sections. Not being surveyed and the right of the State not having attached, and power being expressly reserved to devote them to public uses at any time before the survey, there is no obstacle in the way of giving the language employed by Congress and the Indians in the act of 1889 and the agreement negotiated thereunder the natural import of the words employed. These include sections 16 and 36 with all others.

At page 56 of the State's brief a claim is apparently attempted to be founded upon the provisions of the Indian appropriation act of March 3, 1891 (26 Stat., 989–1044). By sections 8 to 31 eight articles of agreement with Indian tribes for cessions of lands were set out. None of these has any reference to the Chippewa Indians, to the State of Minnesota, or to the lands in controversy. Section 38 of the act (p. 1044) then provides:

> No provision for settlement on or sale of the lands in the various agreements hereinbefore mentioned shall apply to sections sixteen and thirty-six, which land in the States is hereby granted to the State in which they are situated for the support of the common schools of such State under the limitations prescribed by law, and such sections in the Territories of the United States are reserved from occupancy, entry, or sale, under any land law of the United States; but this provision shall not apply to mineral

land which may be disposed of under the laws applicable thereto.

The section has not the remotest bearing upon the matter in controversy. To give it any effect here would be a violation of the subsisting agreement with the Chippewa Indians, a thing not to be presumed or to be done upon mere inference. It is also directly in conflict with the general legislation protecting preemption and homestead settlements upon sections 16 and 36, where made prior to survey. It should, therefore, be applied only to the lands described in the agreements specifically mentioned. There was probably some reason why, as to these lands, Congress was willing to depart from the different policy which had so long prevailed, but there has been no attempt to make this innovation of general application.

**IN CONCLUSION.**

*A construction should be given to the legislation here under consideration which will permit of a full attainment of two objects declared by Congress to be of public concern, viz, the aid of public education through the common schools of the State of Minnesota, and the civilization, education, and support of the Chippewa Indians, who are wards of the nation. The contention of the State can be sustained only by the impairment of the means provided by Congress for the attainment of the second object. In anticipation of such a situation Congress has providently arranged for the full attainment of both objects by giving to the State a right of selecting indemnity lands equivalent in area to such sections 16 and 36. This right to indemnity has become a*

*full equivalent since the act of February 28, 1891 (26 Stat., 796), declaring that such indemnity—*

> *shall be selected from any unappropriated surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur.*

*Since the sustaining of the contention of the Chippewa Indians will not impair the means of aiding public education through the common schools of Minnesota, it presents the better course and the one which has controlled the action of Congress with respect to these lands, as is evidenced by the provision for indemnity in the case of the State and the absence of any provision for indemnity in the case of the Indians.*

It is respectfully submitted that the bill should be dismissed.

WILLIS VAN DEVANTER,
*Assistant Attorney-General.*

# APPENDIX.

**DECISION OF THE SECRETARY OF THE INTERIOR DENYING THE CLAIM OF MINNESOTA TO THE LANDS IN CONTROVERSY, DATED MAY 9, 1899, PUBLISHED IN 28 LAND DECISIONS, 374.**

The State of Minnesota, under the grant of lands made to that State for school purposes, claims sections 16 and 36 of each township embraced within the boundaries of the former Red Lake Indian Reservation.

The Territory of Minnesota was established by the act of March 3, 1849 (9 Stat., 403), section 18 of which made the following reservation of lands for school purposes:

> That when the lands in the said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same.

The act of February 26, 1857 (11 Stat., 166), authorized the people of the Territory to form a constitution and State government preparatory to their admission into the Union, and in its fifth section submitted the following proposition to the people of the proposed State for their acceptance or rejection, to wit:

> SEC. 5. *And be it further enacted*, That the following propositions be, and the same are hereby, offered to the said convention of the

people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said State of Minnesota, to wit:

First. That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools.

March 3, 1857 (11 Stat., 354), before the admission of the State and before the acceptance of said proposition, Congress adopted a joint resolution relating to the school lands in the proposed State, which provides:

That where any settlements, by the erection of a dwelling house or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the Territories of Minnesota, Kansas, and Nebraska, and in the States and Territories hereafter to be created out of the same) before the said sections shall have been or shall be surveyed; or where such sections have been or may be selected or occupied as townsites, under and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, or reserved for public uses before the survey, then other lands shall be selected by the proper authorities in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth of May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for." And if such settler can bring himself, or herself, within the provisions of the act

> of fourth of September, eighteen hundred and forty-one, or the occupants of the townsite be enabled to show a compliance with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections, so settled and occupied, shall be in them, respectively, as if such sections had not been previously reserved for school purposes.

A constitution was adopted by the people of Minnesota October 13, 1857, under which the State was admitted into the Union by the act of May 11, 1858 (11 Stat., 285). Section 3 of article 2 of the State constitution accepted this proposition, with others, the acceptance being couched in the following terms:

> The propositions contained in the act of Congress entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and the State government, preparatory to their admission into the Union on an equal footing with the original States," are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States.

The act of February 26, 1859 (11 Stat., 385), afterwards incorporated into section 2275 of the Revised Statutes, contained a general provision for the protection of persons making settlement upon sections 16 or 36 before survey, which was reenacted by the act of February 28, 1891 (26 Stat., 79), which latter act also contains the following general provision:

> And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or

other reservation, or are otherwise disposed of by the United States.

At the time of the admission of the State of Minnesota into the Union the region of country embracing the lands here in controversy was occupied by the Chippewa Indians. By various treaties between the United States and these Indians the boundaries of the country claimed by the several bands had become definitely fixed and the lands here in question were within the territory claimed and occupied by the Red Lake and Pembina bands. By the treaty of October 2, 1863 (13 Stat., 667), these bands ceded to the United States all their rights in and to a certain defined portion of the lands claimed and occupied by them in the State of Minnesota, leaving unceded a portion thereof, which is spoken of in the sixth article of the treaty as "the reservation," and which came to be known as the Red Lake Reservation. The Indians thereafter occupied this unceded tract under the charge of an agent, and it was called the "Red Lake Indian Reservation" in the President's order of March 18, 1879, enlarging the White Earth Reservation. In the act of January 14, 1889 (25 Stat., 642), it is recognized by Congress as an existing Indian reservation, and this recognition is repeated in the act of June 2, 1890 (26 Stat., 126).

The act of 1889 provided for a commission to negotiate with the Chippewa Indians for the complete cession and relinquishment "for the purposes and upon the terms" stated in said act—

> of all their title and interest in and to all of the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake reservations, and to all and so much of these two reservations as in the judgment of said

> commission is not required to make and fill the allotments required by this and existing acts.

The act directed that any lands so ceded should be surveyed, examined, and classified as "pine lands" and "agricultural lands;" that the pine lands should be sold at public auction to the highest bidder, and that the agricultural lands should be sold to actural settlers under the homestead law at $1.25 per acre; that the money accruing from the disposal of these lands, after deducting expenses, should be placed in the Treasury of the United States to the credit of the Indians, and draw interest at 5 per centum per annum, and that the interest should be paid to and expended for the benefit of the Indians, and at the end of fifty years the principal should be paid to the Indians then living, in cash, in equal shares.

Under this act an agreement was effected with said Indians, which was approved by the President March 4, 1890, which ceded and relinquished to the United States "for the purposes and upon the terms stated in said act" a part of the lands occupied by the Red Lake and Pembina bands, and known as the Red Lake Reservation. Sections 16 and 36 in the ceded portion of this reservation are the lands here in controversy. Before any of the lands so ceded and relinquished were sold under the direction given in the act of 1889, the State of Minnesota presented her claim to every sixteenth and thirty-sixth section as inuring to her under the grant for school purposes. The act of February 26, 1896 (29 Stat., 17), after making some slight changes in the provisions of the act of 1889 respecting the survey, examination, and sale of the ceded lands, contains this provision:

> That sections numbered sixteen and thirty-six in each township so surveyed shall not be

sold until the claim of the State of Minnesota to the ownership of said sections as part of the school lands of said State shall have been determined.

The State's claim to the specific sections 16 and 36 in the ceded Red Lake Reservation lands is predicated upon the following propositions: First, that by reason of the proposition made to the people of Minnesota by the act of February 26, 1857, and the acceptance thereof in the State constitution, a compact was entered into whereby the lands which might by appropriate surveys be identified as embraced within those sections were irrevocably appropriated to the State, so that no law enacted subsequently to the compact could authorize a sale or other disposition of them by the United States. Second, That if the joint resolution of March 3, 1857, be regarded as modifying the proposition made by the United States in the act of February 26, 1857, before its acceptance by the State, these lands were never "reserved for public uses" within the meaning of the joint resolution, (*a*) because they never constituted an Indian reservation and (*b*) because lands reserved for Indians are not reserved for "public uses."

The propositions of the State can not be sustained.

It is not necessary to consider what the result would have been in the absence of the joint resolution of March 3, 1857, because both upon principle and authority the provisions of that resolution constitute an insurmountable obstacle to the State's claim to these specific sections. The act of March 3, 1849, was nothing more than an act of Congress reserving for future disposition the sections named. It did not attain and was not intended to attain the dignity of a compact irrevocable by Congress. Nor did the provision in the act of February 26, 1857, in itself constitute a grant of these lands to the proposed State. While it was intended to form

the basis of a compact irrevocable by Congress, it remained until accepted simply a statutory proposal, subject to modification or revocation by the authority which made it. The lands in the proposed State were at that time unsurveyed, and the specific sections proposed to be granted were not susceptible of identification. To remove any possible uncertainty as to whether when these sections should become identified by survey the right of the State would relate back to the date of the compact, so as to defeat any intervening sale or other disposition of the lands by the United States, or whether the right of the State would attach only to the specific sections which remained unsold and undisposed of at the time of their identification by survey, and to protect preemption and town-site claims to said sections initiated before the survey thereof, and also to protect reservations thereof for public uses, made while the lands remained unsurveyed, the joint resolution of March 3, 1857, was adopted by Congress and approved by the President. This joint resolution, which was called forth by a memorial from the legislature of the Territory of Minnesota, operated as an interpretation, or, if need be, as a modification of the proposal made in the act of February 26, 1857, and being passed before the acceptance of that proposal it follows that the subsequent acceptance in the State constitution was of the proposal as so interpreted and modified. The case of *Minnesota* v. *Bachelder* (1 Wall., 109) involved the right of the State to lands in a section 16, which were claimed under the preemption law in pursuance of settlements made subsequent to the act of February 26, 1857, and prior to the survey. In presenting the case on behalf of the State the attorney-general contended:

> The joint resolution of Congress is void. It can not divest a title which the United States

had previously granted. The organic act of the Territory constituted a *dedication* to public uses, perpetual and irrevocable, and, whatever might have been its effect upon the naked fee, at least divested Congress of all power of disposition over the subject-matter, so far as such disposition should tend to impair the public rights created by that act.

* * * * *

Neither is the case helped by the memorial from the Territorial legislature. The organic act (par. 18) indicates an intention to consecrate these lands for the benefit of the generations who should in future inhabit the State; and while divesting Congress of all power of disposition over them, to withhold it from any other body then in existence. They are reserved "for the purpose of being applied to schools in said Territory, *and in the States and Territories hereafter to be erected out of the same.*" They were not granted to the Territory, and were in no sense its property.

Justice Nelson, in delivering the opinion of the court, disposed of this matter by saying:

It is not important to inquire as to the power of Congress to pass this law independently of any application from the Territorial legislature, as the assent of the people through their convention, by coming into the Union as a State, upon the terms proposed, must be regarded as binding the State. The right of the State to the school sections within it must, therefore, be subject to the modification contained in the joint resolution, and that modification is, that in case a person shall have made a settlement upon any school section, by the erection of a dwelling house on the same, or the cultivation of any portion of it before the survey, and, further, can bring himself within the provisions of the pre-

> emption act of 1841, he shall be entitled to the section thus improved, in preference to any title of the State.

The effect of the joint resolution was to make the status of sections 16 and 36 at the time of survey the criterion in determining whether the State is entitled to the specific sections or to other equivalent lands as indemnity. If at that time these sections were settled upon and improved with a view to preemption, or were selected or occupied as town sites, or were reserved for public uses, the proper authorities of the State were authorized to select other equivalent lands in lieu thereof. Where these sections were thus claimed or reserved before survey they were considered as having been sold or otherwise disposed of within the meaning of the act of February 26, 1857, and as therefore excepted from the grant to the State If not so excepted, there would have been no occasion for permitting the selection of equivalent lands, because it could not have been intended that the State should receive the specific sections and also the indemnity. The case of *Beecher* v. *Wetherby* (95 U. S., 517), relied upon by the State, is without application to the case at bar for the reasons, first, that the compact between the United States and the State of Wisconsin there under consideration was not affected by any interpreting or modifying joint resolution such as is here presented, and, second, that, as shown by the opinion in that case, the section 16 there in controversy was identified by survey in May or June, 1854, so that the title thereupon passed to the State beyond the power of revocation by Congress, while the treaty establishing the reservation, which was claimed to except the land from the grant to the State, did not take effect until in August following. It will not, therefore, be necessary to notice the claimed

conflict between the decision in *Beecher* v. *Wetherby* and that in the earlier case of *Heydenfeldt* v. *Daney Gold and Silver Mining Co.* (93 U. S., 634); but in view of the provisions of the joint resolution of March 3, 1857, what was said by the court in the Heydenfeldt case is especially applicable here. The court there announced the conclusion that under the grant of school lands to the State of Nevada the right of the State to any specific tract must be determined by its status at the time of survey, and in support of that conclusion said (p. 639):

> This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which in its effects would be unjust to the people of the Territory. Besides, no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the State *in præsenti* a quantity of lands equal in amount to the sixteenth and thirty-sixth sections in each township. Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a sixteenth or thirty-sixth section had been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests.

Were these sections "reserved for public uses before the survey?" The claim of the State is that these

lands never constituted an Indian reservation, but remained simply unceded Indian country until the time of their cession and relinquishment under the act of 1889. This claim is clearly refuted by the recognition given to their status as an existing Indian reservation in the treaty of October 2, 1863; in the President's order of March 18, 1879, respecting the White Earth Reservation, and in the acts of January 14, 1889, and June 2, 1890, all of which preceded their survey. However, the existence or nonexistence of this reservation at or before the passage of the act of January 14, 1889, does not materially affect this controversy, because by that act and the agreement made with the Indians thereunder these lands were set apart and directed to be used in raising a fund to be employed in the support, education, and civilization of the Indians. The lands were at that time unsurveyed and could therefore be reserved by Congress for public uses. The words, "reserved for public uses," as they occur in the joint resolution, must be given a reasonable and not a constricted meaning, a meaning which would enable the Government to set apart unsurveyed lands for use as the site of a military post, or for use in raising a fund to be employed in equipping and maintaining a military post. The support, education, and civilization of the Indians is an obligation resting upon the Government, and whatever is employed in the discharge of that obligation is devoted to a public use. Lands which are set apart for the Indians, whether to be used as homes for them or in providing a fund with which to meet the expenses of their support, education, and civilization, are reserved for a public use within the meaning of the joint resolution.

The State's claim to sections 16 and 36 here in controversy is denied, and your office will recognize the

right of the proper authorities of the State to select other equivalent unappropriated public lands as indemnity, as provided by law.

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**REPORTS FOR 1872 AND 1873 OF BOARD APPOINTED TO VISIT RED LAKE RESERVATION UNDER ARTICLE VI OF TREATY OF OCTOBER 2, 1863.**

MINNEAPOLIS, *October 18, 1872.*

SIR: I was also present in company with Rev. D. B. Knickerbocker and Rev. F. C. Coolbaugh at the Red Lake payment. Were about 1,100 of those Red Lakers who were the happy recipients of $8 apiece, together with the usual surplus paid to the chiefs; a doubtful custom in our opinion. The goods and supplies were given not to the bands as such, but to each family and individual; not only in due season, but due measure also, according to the need of each respectively. As a whole, the condition and prospects of the dwellers upon the borders of this beautiful lake are very much brighter than those of the poor Pembinas. They have comfortable houses, about 200. They have very fertile lands, and what is more, something of a disposition to till them; hundreds of acres under cultivation. They garner 6,000 bushels of shelled corn this present season. They increase in population—counting 50 births to 14 deaths for the current year. They have a sawmill and a gristmill; a school also, but desire yet greater things for their children—250 of them—and promise to donate $1,000 of their stumpage money, should they be so fortunate as to get it, for the purpose of establishing a high school. *All the persons residing on this Red Lake Reservation and under authority of law seem to be persons of*

*excellent character and commendably faithful in all the duties with which they have been charged by Government.*

Very respectfully, your obedient servant,

PRESCOTT FAY.

(Signed):

DAVID B. KNICKERBOCKER,
*Rector of Gethsemene Church, Minneapolis.*

F. C. COOLBAUGH,
*Rector of St. John's, Mankato, Minn.*

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REPORT FOR 1873.

To the Hon. E. P. SMITH,
*Commissioner of Indian Affairs,*
*Washington, D. C.*

SIR: As members of the board of visitors to the Red Lake and Pembina Indians, acting under your instructions, we have visited the *Red Lake Reservation*, and having discharged the duties assigned us beg leave to report as follows:

The payment of annuities to the Red Lake Indians, in money and goods, was made on the 6th and 7th of October, by Special Agent Pratt, strictly in accordance with the terms of the treaty. We take pleasure in commending especially the systematic and impartial manner in which the payment was made. We were also impressed with the excellent judgment and energy of the agent manifested in the improvements now in progress at the agency. A favorable site has been selected for the permanent buildings of the agency and for the school farm; the land has been cleared, with the exception of a belt of timber left standing for the purpose of affording shelter from the lake winds; three substantial and commodious houses, well located, for the accommodation of the agent and

employees, are in process of erection, and preparations are perfected for the erection of a permanent school building the present season. The erection of these buildings marks a new era in the history of the work at this point, and will greatly increase its efficiency. The Government buildings hitherto in use have generally been utterly unworthy, and such as to render the residence of the families of the employees at the agency incompatible with health and comfort. We take pleasure in giving our hearty indorsement to the policy which considers and provides for the welfare of the employees of Government at these remote points.

A better class of employees can thus be secured, and worthy and much-needed examples of well-ordered homes can be set before the Indians. We were gratified at the manifest interest of the Indians in these improvements, and the confidence which the work in progress inspires that the Government will fulfill all its pledges to them.

It is worthy of notice that in the council held after the payment the Indians made no complaint respecting any of the employees. And so far as we could learn the character of the employees is such as to give no cause for complaint. The only request pressed upon the visitors by the Indians was that the boarding school might be speedily put in operation and a larger number of children taught.

While our inspection of the agency and the work on the reservation was, in general, highly satisfactory, we desire to call the attention of the Department to certain points in which, in our view, changes for the better can be made.

1. And first, the agency is greatly in need of a new warehouse. The building now in use is poorly located,

poorly constructed, and, in its present condition, affords no security for the Government stores placed in it.

2. We are assured by the miller that the mill in its present condition is inadequate for the demands of the agency. This is due mainly to the inferiority of the wheel, and we would recommend the substitution of a turbine wheel as early as possible.

3. The question of transportation is one of great importance. The present route via Brainerd and Leech Lake involves a wagon journey of nearly 150 miles in length, and the expenses of transportation are enormous. Two shorter routes to the railroad are suggested, the one to the crossing of the Red Lake River on the Pembina road, the other to Detroit on the N. P. R. R. via White Earth. We are informed that an appropriation has already been granted for the construction of a road to the former point. Recent surveys, however, go to show that in consequence of the swampy nature of the country the road can be constructed only at a cost greatly exceeding the appropriation granted. The road to the N. P. R. R. via White Earth can be constructed, it is believed, at much less expense, while the distance by this route will be increased only a few miles, and the rail transportation will be diminished nearly a hundred miles. Further, the fact that the Indians will be much less likely to come into contact with evil-disposed men and with whisky, if transportation is made by the way of White Earth, is an argument of weight in favor of a road to the Northern Pacific.

We therefore suggest the advisability of securing legislation authorizing the use of the appropriation for the construction of a road to the crossing of the Red Lake River in the construction of a road to the N. P. R. R., via White Earth, instead.

4. The difficulties constantly arising upon this and other reservations through the introduction of whisky, and the powerlessness of the agents to enforce laws and punish offenders, leads us to call attention to the importance of securing, for the agents of these distant reservations, at least, the powers of the United States marshal.

Respectfully submitted.

HENRY M. TENNEY,
JAMES H. BABBITT,
*For the Board of Visitors.*

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# In the Supreme Court of the United States.

THE STATE OF MISSISSIPPI,

EUGAR AMOS STEPHENS, Secretary of the Interior, and HENRY CLAY EVANS, Commissioner of the General Land Office, } Appellees.

## AGREED STATEMENT OF FACTS.

# In the Supreme Court of the United States.

THE STATE OF MINNESOTA
*v.*
ETHAN ALLEN HITCHCOCK, SECRETARY of the Interior, and Binger Hermann, Commissioner of the General Land Office. } In equity.

## AGREED STATEMENT OF FACTS.

It is hereby stipulated and agreed by and between the parties:

*First.* That the answer of the defendants fully describes the lands in controversy, and that the bill of complaint shall be given like effect as if it clearly described the lands in the manner in which they are set forth in said answer.

*Second.* That at the time of the filing of the bill of complaint a large portion of the lands so in controversy had been regularly surveyed by the properly constituted authorities of the United States; that the remaining portion of said lands have, since the filing of said bill of complaint, been so surveyed; that this suit may be heard and determined in like manner and with like effect in all respects as if all of said lands so in controversy had been so surveyed at the time of the filing of said bill of complaint, and as if such fact had been fully set forth in the bill, but this shall not detract from the allegation in the answer, now admitted,

that all of said lands remained unsurveyed until after the passage of the act of Congress of January 14, 1889, and until after the session of March 4, 1890, named in the answer,

*Third.* That except as its status may have been affected or changed by the treaty of October 2, 1863 (13 Stat., 667), by the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian Reservation, by the act of Congress of January 14, 1889 (25 Stat., 642), or by the act of Congress of June 2, 1890 (26 Stat., 126), or by one or more of these, the district or country embracing the lands in controversy continued to be unceded Indian lands subject to the original right of occupancy of the Chippewa Indians up to the time of the action had on March 4, 1890, under the said act of January 14, 1889.

*Fourth.* That the letter of September 2, 1891, and the two letters of September 3, 1891, from Cushman K. Davis, a Senator in Congress from the State of Minnesota, to the Commissioner of the General Land Office, and the answer of the Commissioner of the General Land Office, dated September 9, 1891, referred to in the defendants' answer herein, are as follows:

WASHINGTON, D. C., *September 2, 1891.*

Honorable THOMAS H. CARTER,
*Commissioner of the General Land Office.*

MY DEAR SIR:

Respecting the disposition of the lands in the so-called Red Lake Indian Reservation in Minnesota, it is claimed by the State of Minnesota that that State is entitled to sections sixteen and thirty-six in every township, and where any part of said sections have been

sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be.

These lands were granted to the State of Minnesota by the act admitting it to the Union, approved Feb'y 26, 1857 (11 Stats., p. 166), by which it is provided:

"*First.* That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

As to the Red Lake Reservation, so called, it never was reserved by any Executive or legislative action. It remains in fact, or did until the legislation of 1889, as Indian country.

The treaty of 1864 (if I correctly remember the date) ceded to the United States a large tract of Indian country in Minnesota and Dakota, and left simply this Red Lake Reservation, so called, unceded, and it has since so remained until the legislation of 1889.

There will be found in the Federal Reporter of some twelve or fourteen years ago a decision by Judge McCreary of the Circuit Court of the United States for the district of Minnesota, the title of which, I think, is the United States *v.* Forty-two gallons of whisky, etc., sustaining the above proposition.

However this may be, while this land was unceded Indian country within the limits of the proposed State of Minnesota, Congress, by the act above cited, the United States specifically granted these sections to the State, whereby the State became vested with a present title, and any action taken by the Government thereafter of course can not divest it.

Very respectfully,

C. K. DAVIS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept. 3, 1891.*

Hon. THOMAS H. CARTER,
*Com. Gen. Land Office.*

MY DEAR SIR:

In connection with my letter written to you yesterday respecting the claims of the State of Minnesota to sections sixteen and thirty-six, school lands, I have the honor to refer you to the ruling of the Department in the case of the State of Kansas, Aug. 14, 1877, p. 1107, Vol. 2, Copp's Public Land Laws.

Yours truly,

C. K. DAVIS.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Sept. 3, 1891.*

Hon. THOMAS H. CARTER,
*Com. Gen. Land Office.*

MY DEAR SIR: As bearing upon the claim of the State of Minnesota to sect. 16 and 36 in Indian country or on Indian reservation, I refer you to Beecher *v.* Wetherby, 95 U. S., p. 517.

The Sup. Court distinctly holds, p. 523, *et seq.*:

1. That every sect. 16 (all that were granted in each township to Wisconsin) which had not been sold or otherwise disposed of should, as an unalterable condition of admission, be granted to the State for the use of schools.

2. It matters not whether the words of the compact are merely promissory or as operating as a transfer (of) the title to the State. In either case the section was appropriated to the State.

3. No subsequent law authorizing of it (i. e., a sale) could be construed to embrace "such lands." They could not be divested from their appropriation to the State.

4. The act of Congress, Feb'y 6, 1871, authorizing the sale of the township occupied by certain Indian tribes held to apply only to those portions which were outside sect. 16.

Yours truly,

C. K. DAVIS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September 9, 1891.*

Hon. C. K. DAVIS,
*U. S. Senate, Washington, D. C.*

SIR: I have the honor to acknowledge the receipt of your three letters of the 2d and 3d instant, respecting the condition of the grant to the State of Minnesota for school purposes, made by section 5 of the act of February 26, 1857 (11 U. S. Stat., 166), with reference to the lands embraced in the Red Lake Indian Reservation.

I am unable to determine from your said communications whether your question applies to the lands of which, under the provisions of the act of January 14, 1889 (25 U.S.Stat., 642), commissioners were appointed to secure the relinquishment of the Indian title, or to the lands within the Red Lake Reservation, which are excepted from the provisions of said act, and which, under the provisions thereof are to be allotted to the Indians of said tribe in severalty.

It is provided in section 3 of said act of January 14, 1889:

"That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section 1 of this act, all of the Chippewa Indians in the State of Minnesota, except those on Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reser-

vation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the others of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven * * *"

The question of the right of the several States to sections 16 and 36 in each township within the Indian reservation the title to which has been extinguished and the land surveyed, under the direction of the United States, has been decided affirmatively on more than one occasion, both by this Department and by the courts.

In a decision rendered by this office on August 14, 1877 (2 Copp's L. D., p. 1107, ed. 1882), which was approved by the Honorable Secretary of the Interior, upon the question of the right of the State of Kansas to sections 16 and 36 within Indian reservations in said State, the Commissioner said:

"I am forced to adopt the view that the Indian reservations were just as much a part of the State of Kansas, *in contemplation of the acts referred to*, granting school sections, as any other portion. It is true that the State could not take possession at once, or as it did of other lands, for the right of possession was in the Indians temporarily. The right of the State to claim the lands was made dependent upon certain conditions, or contingencies, which the acts referred to named. When these things were accomplished the State's right attached. The Indian reservations were excepted out of the boundaries of the State only so long as the Indian title remained unextinguished, and no longer. This title extinguished, the lands became part of the State, and when part of the State, the State was entitled to the 16th and 36th sections therein. The latter fact just as necessarily resulted as the former."

Other portions of this decision are equally emphatic

in declaring that upon the extinguishment of the Indian title and the survey of the lands, the right of the State to the school sections attached.

In the decision of the Honorable Secretary of the Interior involving the same question in the State of Colorado, dated December 6, 1887 (6 L. D., 412), it is stated:

"It is evidence from the very terms of the grant that Congress intended to grant to Colorado (and the same is true of other States), two sections for every township in the State to be taken of the sixteenth and thirty-sixth sections, where such sections at the time of survey have not been sold or otherwise disposed of, and where at the time of survey such sections have been sold or disposed of, then other lands equivalent thereto and as contiguous as may be are granted to said State in lieu of the sixteenth and thirty-sixth sections."

The Honorable Secretary said further:

"But even if the Indian title had not been extinguished at the date of the grant, it would not have prevented the grant from attaching at the date of survey, subject to the Indian right of occupancy, unless the section had prior to that time been sold or disposed of. If the specific section had been disposed of at the date of survey, the State would be entitled to indemnity under the express terms of the grant."

Concerning the indemnity clause of the grant, the Honorable Secretary in the same communication said:

"I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of the survey and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the Government and then satisfy its grant by taking the lands specifically granted."

The Honorable Secretary also cited a number of decisions by the courts as sustaining his view of the case.

The grants of school lands to the States of Kansas and Colorado are practically the same as the grant to the State of Minnesota.

The above decisions taken in connection with the act of February 28, 1891, amended sections 2275 and 2276 of the Revised Statutes, leaves no room for doubt that, under the provisions of the act of February 26, 1857, for the admission of the State of Minnesota into the Union, said State is entitled to the 16th and 36th sections in every township within the Indian reservations in said State, upon the extinguishment of the Indian title and the survey of the lands under the direction of the United States Government; and to indemnity for those sections within the unceded portions of said reservations, if the State shall elect to select such indemnity lands in preference to waiting for the Indian title to be extinguished in order that it may take those sections in place, in which event the selection of such indemnity lands by the State would be a waiver of the right to claim the said school sections in place.

Very respectfully,

THOS. H. CARTER,
*Commissioner.*

*Fifth.* That at the date of the admission of the State of Minnesota into the Union, approximately one-fourth of the total of the area thereof was unceded Indian lands, subject to the original right of occupancy by Indians.

*Sixth.* That upon the hearing of this cause either party shall be at liberty to refer to and read from any Indian treaty, any act or resolution of Congress or of the Territory or State of Minnesota, whether private or public, any publication made under the authority of Congress or either house

thereof, or of any executive department or bureau therein, including the pamphlet known as "Executive Orders relating to Indian Reserves," so far as the same may be relevant or material to this suit, or a proper matter for the court to consider in any aspect of this cause; and any such matter may be so referred to or read from with like effect as if it were herein fully set forth.

*Seventh.* That if in other respects the complainant is entitled to injunctive relief against the defendants herein, the action intended to be taken by the defendants at the time of the filing of the bill of complaint herein and still contemplated and threatened by them, as admitted in their answer, is of such a character as to justify a decree granting a permanent injunction.

*Eighth.* This cause may be heard upon the bill of complaint, answer, and this stipulation.

The parties hereby join in the earnest request that this cause be set down for hearing at the earliest practicable time.

FRANK B. KELLOGG,
W. B. DOUGLAS,
H. W. CHILDS,
*Solicitors for Complainant.*

WILLIS VAN DEVANTER,
*Assistant Attorney General, Solicitor for Defendants.*

Dated, *February 16, 1901.*